Parker Poe

J. Ashley Cooper
Partner
Telephone: 843.727.2674
Direct Fax: 843.727.2680
ashleycooper@parkerpoe.com

Atlanta, GA
Charleston, SC
Charlotte, NC
Columbia, SC
Greenville, SC
Raleigh, NC
Spartanburg, SC

March 1, 2019

Via Electronic Filing

The Honorable Jocelyn G. Boyd
Chief Clerk/Administrator
Public Service Commission of South Carolina
101 Executive Center Drive
Columbia, South Carolina 29210

Re: Beulah Solar, LLC – Request for Modification of an Interconnection Agreement with South Carolina Electric & Gas Company
Docket Number 2018-401-E

Dear Ms. Boyd:

Enclosed for filing in connection with the above-referenced matter, please find *South Carolina Electric & Gas Company's Response in Opposition to Motion to Hold Docket in Abeyance.*

By copy of this letter, we are serving the Response in Opposition to Motion to Hold Docket in Abeyance upon the parties of record and attach a certificate of service to that effect.

If you have any questions, please do not hesitate to contact me.

Sincerely,

J. Ashley Cooper

JAC:hmp
Enclosure
cc: (Via Electronic Mail and First Class Mail)
Richard L. Whitt

BEFORE THE

PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

DOCKET NO. 2018-401-E

IN RE: Beulah Solar, LLC - Request for Modification of an Interconnection Agreement with South Carolina Electric & Gas Company	)	South Carolina Electric & Gas Company's Response in Opposition to Motion to Hold Docket in Abeyance

Pursuant to S.C. Code Ann. Regs. § 103-829(A) and other applicable rules of practice and procedure of the Public Service Commission of South Carolina ("Commission"), South Carolina Electric & Gas Company ("SCE&G") responds in opposition to Beulah Solar, LLC's ("Beulah") and Eastover Solar, LLC's ("Eastover")(collectively, "Solar Developers") Motion to Hold Docket in Abeyance, filed on February 21, 2019, in the above-referenced docket (the "Motion"). Solar Developers now seek to indefinitely halt a docket they initiated and to preclude SCE&G from developing its own defenses and claims. For this and the reasons set forth below, SCE&G respectfully requests that the Motion be denied.

BACKGROUND

On December 28, 2018, Beulah filed a Motion to Maintain Status Quo and a Request for Modification in the above-referenced docket. While Beulah attempts to link or connect its Motion to Maintain Status Quo and Requests for Modification as seeking similar relief, its requests are distinct and one is not dependent on the other. Beulah requested to review and

potentially modify the curtailment language of the interconnection agreement ("Beulah IA") based on the potential action of a stakeholder process. Beulah's separate Motion to Maintain Status Quo purports to preserve circumstances relating to the Beulah IA through Commission Order, but in reality seeks to revive the now terminated Beulah IA and indefinitely extend its deadlines. Beulah's failure to make its Milestone Payment 1 by the extended deadline of January 2, 2019, and in the absence of any Order by the Commission condoning such failure, the Beulah IA terminated by its own terms and Beulah was removed from the interconnection queue.[1]

On January 24, 2019, Eastover Solar filed essentially the same two distinct demands in Docket No. 2019-51-E. Eastover similarly failed to make its Milestone Payment 1 on or before January 29, 2019 pursuant to its interconnection agreement with SCE&G ("Eastover IA") (together with the Beulah IA, the "IAs"). The Eastover IA terminated by its own terms and Eastover was removed from the interconnection queue.[2]

In a now combined docket, and conceding their Requests for Modification were premature, Solar Developers filed a Motion to Hold the Docket in Abeyance on February 21, 2019, and then filed a Motion for Protective Order on February 22, 2019, seeking to delay their responses to SCE&G's discovery and otherwise prevent this matter from proceeding. Solar Developers' recent filings, however, focus solely on whether the Requests for Modification are ripe for resolution by the Commission given the reference to the newly scheduled stakeholder process. The Abeyance and Protective Order requests ignore, however, issues related to Solar Developers' Motion to Maintain Status Quo and whether the IAs should now be revived. These issues are independent from any stakeholder process. Solar Developers' attempt to indefinitely

[1] SCE&G sent a notice acknowledging termination to Beulah on January 7, 2019.
[2] SCE&G sent a notice acknowledging termination to Eastover on January 30, 2019.

stall resolution of the dispute they initiated—which is simply a repackaging of their attempt to indefinitely extend their deadlines under the IAs—and should be denied.

ARGUMENT

I. The IAs terminated by their terms.

Pursuant to Appendix 2 of the IA, Solar Developers agreed to:

> [P]ay for the estimated Interconnection Facilities and Upgrades, in Appendix 6, which together total $6,054,500.00, which is the basis for the Milestone Payments in Appendix 4 of this Agreement. Failure to make the payment may result in the termination of the Generator Interconnection Agreement and the withdrawal of the Generator Interconnection Application.

See e.g., Appendix 2 of the Beulah IA.

The requirements in the IAs, including Appendix 2 and Appendix 4, are plain, and the intent is clear—the Milestone Payments are to be made or termination may result. There is no language in the IAs that excuses performance based on challenges to the Milestones. There is no language in the IAs that makes the payment Milestone Payment 1 contingent upon, or in any way related to, the ability to obtain financing. The payment of Milestone Payment 1 is not related in any way to the curtailment provisions contained in Section 3.4 or Appendix 5 of the IA.[3]

Solar Developers no longer have IAs and are not in the SCE&G interconnection queue. As stated above, SCE&G has previously noted this to each of Beulah, Eastover, and the Commission. Therefore, while Solar Developers request to hold the docket in abeyance until the stakeholder process concludes, this request is of no matter given the obvious and critical fact that neither Beulah nor Eastover have an IA. In fact, Solar Developers do not make a single reference to their Motions to Maintain Status Quo or their failure to make the required Milestone Payment 1. Ignoring their pending requests to reinstate their IAs for failure to make Milestone Payment 1,

[3] Assuming, *arguendo*, the Commission were to someday revise the curtailment provisions of Appendix 5 that promote and ensure the reliability of the SCE&G system, this would not impact the language in Appendix 2 and Appendix 4 of the IA relating to the Milestone Payments (as defined in the IAs).

Solar Developers simply argue the convenience of deciding their Request for Modification after the stakeholder group concludes its work. However, before Solar Developers can examine *potentially* modifying curtailment provisions, they must first have IAs.

Solar Developers did not secure timely injunctive relief or any other relief to extend or otherwise eliminate their contractual obligations to make timely Milestone Payments. As SCE&G previously stated in its Response in Opposition to Motion to Maintain Status Quo, "[s]imply filing the Motion does not timely extend the deadline for Milestone Payment 1, as a party similarly seeking a motion for a preliminary injunction does not automatically secure the injunction by filing, but is only able to secure the requested relief through later order of the court."[4] *See* Response in Opposition to Eastover's Motion to Maintain Status Quo at 2-3. Solar Developers never received injunctive relief and this Commission has not independently issued an order holding the matters in abeyance. Unless Solar Developers take the affirmative steps to meet their burden of proof and convince this Commission to take the extraordinary measure of reviving the automatically terminated IAs, and then amending the Milestones listed in Appendix 4 and other deadlines in the IA, there is nothing to hold in abeyance.

II. <u>The determination of whether to reinstate the IAs should not be delayed by the unrelated stakeholder process.</u>

SCE&G administers its queue in a nondiscriminatory and comparable fashion to allow, among other things, viable projects to move forward and not disadvantage lower queued projects. The language of the IA appropriately balances an interconnecting customer's reasonable need for an extension, despite its good-faith efforts, against the needs of the utilities and the public in

[4] The comparison to injunctive relief is appropriate, as a Motion to Maintain Status Quo is essentially a motion for a preliminary injunction using different terms. The South Carolina Supreme Court has repeatedly stated "the sole purpose of a temporary injunction is to preserve the status quo…." *See Powell v. Immanuel Baptist Church*, 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973).

order to prevent disparate treatment of others in the queue and reduce queue congestion. Therefore, extensions of Milestones must be noted early and should not result in unnecessary delays or "gaming." The FERC has been clear that extensions might present harm to later-queued interconnection customers in the form of uncertainty, cascading restudies, and shifted costs necessitated if the project is removed from the queue at a later date. *See, e.g.*, *Midcontinent Indep. Sys. Operator, Inc.*, 147 FERC ¶ 61,198, 62,113 (June 13, 2014) (stating the Commission's goal of "discouraging speculative or unviable projects from entering the queue [and] getting projects that are not making progress toward commercial operation out of the queue"). For these reasons, the FERC approved termination of interconnection agreements where the interconnection customer failed to make interconnection payments. *See Pacific Gas & Elec. Co.*, 146 FERC ¶ 61,120, 61,521 (Feb. 21, 2014); *Midwest Independent Transmission System Operator, Inc.*, 143 FERC ¶ 61,114, 61,709 (May 10, 2013).

Solar Developers' IAs terminated for failure to perform under their IAs. SCE&G, following the language of the IAs and FERC precedent, properly removed Solar Developers from its interconnection queue and has been studying lower queued projects without considering these two projects. Therefore, if the Commission elects to reinstate one or both of the IAs, it must do so sooner rather than later because such a decision will trigger cascading restudies and affect other solar developers' with viable projects which are currently being studied without consideration of the Beulah or Eastover projects. While Solar Developers state the stakeholder process will have its initial meeting on March 7, 2019, they do not and cannot state when the stakeholder process will be completed. Indeed, Beulah Solar concedes in its limited interrogatory responses that they lack information to state when the Stakeholder Process will be completed or what modification of the curtailment language will result. *See* Beulah Solar's Response to

Interrogatory Numbers 9 and 10 attached as Exhibit A and incorporated herein. What sounds like a limited request is yet another effort to create an open-ended delay. Should the Commission choose to reinstate these terminated IAs, additional delay, particularly given the open-ended nature of this request, will only further exacerbate a very burdensome and difficult restudy process ultimately to the detriment of pending, lower queued solar projects.

III. Solar Developers Motion to "Maintain the Status Quo" was ineffectual and its Request for Modification was premature.

With respect to the limited question of whether it was premature for Solar Developers to file Requests for Modification months prior to even the formation of a stakeholder group, SCE&G agrees those Requests were premature. In fact, in its earlier Response in Opposition to Request for Modification, SCE&G explained that:

> The proper time to consider the Request is after the stakeholder process has concluded its action, and then only if Solar Developer properly supports such an extraordinary request. Indeed, by making the Request now, rather than after the stakeholder process is completed, it strongly suggests this Request is being made simply to support the Solar Developer's Motion to Maintain Status Quo in the hopes of creating a delay that would otherwise be unwarranted.
>
> *See* SCE&G's Response in Opposition to Eastover's Request for Modification at 5.

Solar Developers' recent Motion to Hold Docket in Abeyance simply acknowledges what SCE&G pointed out in its initial replies; these are improper efforts to create delays in the solar queue. The Requests for Modification were premature, but Solar Developers presumably filed these prematurely to create some sort of loose link between the curtailment language and the payment of Milestone Payment 1 to potentially excuse their nonperformance. However, as explained above, there is no contractual language or direction from the Commission that excused their failure to make the Milestone Payment 1.

As to Solar Developers' recent realization that concluding the stakeholder process may result in "savings of money expense and conservation of judicial economy," SCE&G must point out to Solar Developers and the Commission that the filing of these premature motions and related delay tactics have already wasted Commission and staff time and resources, and resulted in SCE&G allocating personnel time and its limited financial resources.

CONCLUSION

Solar Developers freely negotiated their IAs with SCE&G. Solar Developers reviewed the provisions of the IAs and agreed to them at the time they negotiated and executed the IAs. Solar Developers are sophisticated parties. Solar Developers may not simply put their heads in the sand now, point to alleged savings associated with further delays, and ignore that their failure to make the required Milestone Payment 1 resulted in their IAs being terminated. To seek further delay of the entire docket based on the future outcome of the stakeholder process ignores the serious legal hurdles Solar Developers face and further ignores the interests of the larger solar industry and, in particular, those developers with viable projects lower in the queue. As Solar Developers are unwilling to litigate the proceeding they initiated, Solar Developers are free to withdraw their Requests for Modification and execute IAs once the stakeholder process concludes.

For the reasons stated above, the Motion to hold the Docket in Abeyance should be denied.

[SIGNATURE PAGE FOLLOWS]

Respectfully Submitted,

/s/ J. Ashley Cooper

K. Chad Burgess, Esquire
Matthew W. Gissendanner, Esquire
South Carolina Electric & Gas Company
Mail Code C222
220 Operation Way
Cayce, South Carolina 29033-3701
Phone: (803) 217-8141
Fax: (803) 217-7810
Email: chad.burgess@scana.com

J. Ashley Cooper, Esquire
Parker Poe Adams & Bernstein LLP
200 Meeting Street
Suite 301
Charleston, South Carolina 29401
Phone: (843) 727-2674
Fax: (843) 727-2680
Email: ashleycooper@parkerpoe.com

Attorneys for South Carolina Electric & Gas Company

Cayce, South Carolina
March 1, 2019

BEFORE THE

PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

DOCKET NO. 2018-401-E

IN RE: Beulah Solar, LLC - Request for Modification of an Interconnection Agreement with South Carolina Electric & Gas Company	)	South Carolina Electric & Gas Company's Response in Opposition to Motion to Hold Docket in Abeyance

This is to certify that I, Ashley Cooper, have this day caused to be served upon the person named below the ***South Carolina Electric & Gas Company's Response in Opposition to Motion to Hold Docket in Abeyance*** by electronic mail and by placing a copy of same in the United States Mail, postage prepaid, in an envelope addressed as follows:

(*via email: rlwhitt@austinrogerspa.com*)
Richard L. Whitt
Austin & Rogers, P.A.
508 Hampton Street, Suite 300
Columbia, South Carolina 29201

/s/ J. Ashley Cooper

This 1st day of March, 2019